Malayan Banking Bhd (formerly known as 'Mayban Finance Bhd') v Boo Hock Soon @ Boo Choo Soon

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(IM)-2551 OF 2010
ABDUL MALIK ISHAK, SYED AHMAD HELMY AND BALIA YUSOF JJCA
1 OCTOBER 2012

Banking — Financing facilities — Letter of guarantee — Continuing on demand guarantee given by company director to bank — Whether claim against guarantor time barred — Whether guarantor's obligation discharged by subsequent additional letter of offer — Whether certificate of indebtedness could be used to prove indebtedness

Civil Procedure — Action — Cause of action — Continuing on demand guarantee given by company director to bank — Bank's cause of action against director only arose after notice of demand issued by bank

Civil Procedure — Summary judgment — Triable issues — Burden on defendant to show triable issue of fact or law — Issue raised must be arguable issue requiring trial

Contract — Guarantee — Liability of guarantors — Continuing on demand guarantee given by company director to bank — Whether claim against guarantor time barred — Whether guarantor's obligation discharged by subsequent additional letter of offer — Whether certificate of indebtedness could be used to prove indebtedness

The plaintiff bank had by way of a letter of offer dated 25 February 1997 and a facility agreement granted credit facility to the borrower, Utec Trading Sdn Bhd. By way of a letter of guarantee dated 22 March 1997, the defendant agreed to stand as guarantor to the borrower. Clause 13 stated that it was a continuing guarantee. The terms of the said facility were later revised through an additional letter of offer dated 15 April 2000. The borrower defaulted on the repayment terms and the plaintiff obtained judgment in default of appearance against the borrower ('the first suit'). The plaintiff however withdrew the first suit against the defendant with liberty to file afresh since the defendant did not receive the notice of demand issued by the plaintiff dated 1 November 2000 ('the first notice of demand'). The plaintiff then issued a letter of demand dated

21 October 2008 ('the second notice of demand') to the defendant and then commenced the present suit against the defendant. The learned judicial commissioner ('JC') dismissed the plaintiff's application for summary judgment. Aggrieved, the plaintiff filed this appeal. The defendant argued that: (i) the plaintiff's suit was time barred since the borrower's breach had occurred as early as July 2000 and that the six years time period had expired in 2006; (ii) the defendant's obligation as guarantor was discharged by virtue of the additional letter of offer dated 15 April 2000; and (iii) the certificate of indebtedness could not be used to prove indebtedness.

Held, allowing the appeal and entering summary judgment against the defendant:

(1) In challenging the O 14 application, all that a defendant needs to do is to show to the court that there is a triable issue of fact or of law. It is not sufficient for the defendant to just raise an issue because the issue that is raised must be an arguable issue which requires a trial in order to determine it, once and for all; *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996] 5 MLJ 345 referred; *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241 (FC) referred (see para 18).

(2) The cause of action of the plaintiff only begun when the second notice of demand was issued against the defendant on 21 October 2008. The accrual of the cause of action was calculated from 21 October 2008 and not from the date of the breach by the borrower which was sometime in early July 2000. The words 'on demand' appearing in cl 1 of the letter of demand meant that the second notice of demand issued by the plaintiff on 21 October 2008 against the defendant triggered the cause of action and that being the case limitation had not set in; *Wee Kee Puan v Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 64 (FC) referred; *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 referred; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 referred; *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613 referred (see paras 24–28).

(3) As a director of the borrower, the defendant was bound by the terms of the additional letter of offer since it was received by the borrower and payments were made by the borrower in accordance with the terms of the additional letter of offer which essentially varied the terms and the amount of repayment. The additional letter of offer would not discharge the defendant guarantor's liability (see para 29).

(4) Clause 5 of the letter of guarantee allowed usage of the certificate of indebtedness as conclusive evidence to prove the debt that was due. Further, the defendant had not challenged the certificate of indebtedness in any of his affidavits in reply nor was there any averment that there were

manifest errors in the said certificate. A submission from the bar cannot be entertained by the court; *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) referred; *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 referred (see paras 32–34).

(5) There were no triable issues at all nor any defence to the claim advanced by the plaintiff (see para 36).

[Bahasa Malaysia summary

Bank plaintif telah, melalui surat tawaran bertarikh 25 Februari 1997 dan suatu perjanjian kemudahan, memberikan kemudahan kredit kepada peminjam, Utec Trading Sdn Bhd. Melalui surat jaminan bertarikh 22 Mac 1997, defendan telah bersetuju menjadi penjamin kepada peminjam. Klausa 13 menyatakan bahawa ia adalah satu jaminan yang berterusan. Terma kemudahan tersebut kemudiannya dipinda oleh surat tawaran tambahan bertarikh 15 April 2000. Peminjam melanggar terma-terma pembayaran balik dan plaintif memperolehi penghakiman terhadap peminjam atas ketidakhadirannya ('guaman pertama'). Walau bagaimanapun, plaintif menarik balik guaman pertama terhadap defendan dengan kebebasan untuk memfailkan semula kerana defendan tidak menerima notis permintaan yang dikeluarkan oleh plaintif bertarikh 1 November 2000 ('notis pertama tuntutan'). Plaintif kemudiannya mengeluarkan surat tuntutan bertarikh 21 Oktober 2008 ('notis tuntutan kedua') kepada defendan dan kemudian memulakan guaman ini terhadap defendan. Pesuruhjaya kehakiman ('PK') menolak permohonan plaintif untuk penghakiman terus. Tidak berpuas hati, plaintif memfailkan rayuan ini. Defendan menghujahkan bahawa: (i) saman plaintif terhalang oleh had masa kerana pelanggaran peminjam telah berlaku seawal Julai 2000 dan bahawa tempoh masa enam tahun telah tamat pada tahun 2006; (ii) kewajipan defendan sebagai penjamin telah dilepaskan dengan sebab surat tawaran tambahan bertarikh 15 April 2000; dan (iii) sijil keberhutangan tidak boleh digunakan untuk membuktikan keberhutangan.

Diputuskan, membenarkan rayuan dan memasukkan penghakiman terus terhadap defendan:

(1) Dalam mencabar permohonan A 14, apa yang perlu dilakukan oleh defendan adalah membuktikan kepada mahkamah bahawa terdapat isu fakta atau undang-undang yang perlu dibicarakan. Tidak cukup untuk defendan sekadar membangkitkan satu isu kerana isu yang dibangkitkan mestilah isu yang boleh diperdebatkan yang memerlukan perbicaraan untuk penentuan sekali sahaja; *Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996] 5 MLJ 345 dirujuk; *Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241 (MP) dirujuk (lihat perenggan 18).

(2) Kausa tindakan plaintif hanya bermula apabila notis tuntutan kedua telah dikeluarkan terhadap defendan pada 21 Oktober 2008. Kausa

tindakan terakru dikira bermula dari 21 Oktober 2008 dan bukan dari tarikh pelanggaran oleh peminjam kira-kira awal bulan Julai 2000. Perkataan 'on demand' dalam klausa 1 surat tuntutan bermakna bahawa notis tuntutan kedua dikeluarkan oleh plaintif pada 21 Oktober 2008 terhadap defendan mencetuskan kausa tindakan dan bahawa yang had masa belum bermula; *Wee Kee Puan v Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 64 (MP) dirujuk; *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 dirujuk; *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31 dirujuk; *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613 dirujuk (lihat perenggan 24–28).

(3) Sebagai pengarah kepada peminjam, defendan terikat dengan terma-terma surat tawaran tambahan kerana ia telah diterima oleh peminjam dan pembayaran-pembayaran telah dibuat oleh peminjam selaras dengan terma surat tawaran tambahan yang pada asasnya mengubah terma-terma dan jumlah pembayaran balik. Surat tambahan tawaran tidak akan melepaskan penjamin defendan daripada liabiliti (lihat perenggan 29).

(4) Klausa 5 surat jaminan membenarkan penggunaan sijil keberhutangan sebagai bukti yang kukuh untuk membuktikan hutang yang belum dilangsaikan. Di samping itu, defendan tidak mencabar sijil keberhutangan dalam mana-mana afidavit jawapannya dan tidak terdapat sebarang hujahan bahawa terdapat kesilapan yang nyata dalam sijil tersebut. Satu hujahan dari majlis (bar) tidak boleh dilayan oleh mahkamah; *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) dirujuk; *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 dirujuk (lihat perenggan 32–34).

(5) Tiada isu yang boleh dibicarakan sama sekali mahupun apa-apa pembelaan bagi tuntutan yang dimajukan oleh plaintif (lihat perenggan 36).]

Notes

For cases on liability of guarantor, see 3(3) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 4746–4756.

For cases on triable issues, see 2(4) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 8888–8996.

Cases referred to

Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru [1995] 2 MLJ 287; [1995] 2 AMR 1174; [1995] 4 CLJ 339, HC (refd)

Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors [1991] 2 MLJ 202, HC (refd)

Bradford Old Bank, Ltd v Sutcliffe [1918] 2 KB 833, CA

Brown's Estate, In re, Brown v Brown [1893] 2 Ch 300, Ch D (refd)
Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282, FC (refd)
Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone [1987] 1 Lloyd's Rep 546, QBD (refd)
Fahey v MSD Speirs Ltd [1973] 2 NZLR 655, CA (refd)
General Financial Corporation of Canada v LeJeune [1918] 1 WWR 372 (refd)
General Rail Syndicate, In re, Whiteley's case [1900] 1 Ch 365 (refd)
Harburg India Rubber Comb Co v Martin [1902] 1 KB 778, CA (refd)
Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors [1996] 5 MLJ 345, HC (refd)
Mallet v Bateman (1865) LR I CP 163, Ex Ch (refd)
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281; [1995] 1 CLJ 609, CA
Pacific Bank Bhd, The v Chan Peng Leong [1998] 2 MLJ 613; [1998] 2 CLJ 440, CA (refd)
Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd [2005] 3 MLJ 552, HC (refd)
Sampson And Others, Assignees of Cook, a Bankrupt v Burton And Others (1820) 129 ER 891; (1820) 4 Moore CP 515 (refd)
Sicklemore v Thistleton [1814–23] All ER Rep 355; (1817) 6 M & S 9 (refd)
Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd [2004] 2 MLJ 31; [2004] 1 CLJ 532, CA (refd)
Thomas Lakeman v JP Mountstephen (1874) LR 7 HL 17, HL (refd)
Voo Min En & Ors v Leong Chung Fatt [1982] 2 MLJ 241, FC (refd)
Wee Kee Puan v Oversea-Chinese Banking Corporation Ltd [1982] 1 MLJ 64, FC (refd)

Legislation referred to

Rules of the High Court 1980 O 14
Statute of Limitations [UK]

Ong Wee En (Shahrizat Rashid & Lee) for the plaintiff bank.
V Amareson (Amareson & Meera) for the defendant guarantor.

Abdul Malik Ishak JCA (delivering judgment of the court):

INTRODUCTION

[1] The learned judicial commissioner ('JC') of the Penang High Court dismissed the application of the plaintiff bank for summary judgment against

the defendant guarantor. Aggrieved, the plaintiff bank appealed to this court.

THE FACTS

[2] The plaintiff bank by way of a letter of offer dated 25 February 1997 and a revolving credit facility agreement dated 22 March 1997 granted a revolving credit facility in the sum of RM750,000 to the borrower by the name of Utec Trading Sdn Bhd ('the borrower'). The terms of the said revolving credit facility were later revised as reflected in the additional letter of offer dated 15 April 2000 styled as the 'Revolving Fund Facility under (the) New Principal Scheme (NPGS)'.

[3] The letter of offer dated 25 February 1997 alluded to the sum of RM750,000 as the revolving fixed facility. The tenure would be up to a maximum period of 72 months from the date of the initial drawdown. And the security was fastened on:

(a) the guarantee cover by Credit Guarantee Corporation Malaysia Bhd ('CGCMB') for an amount of RM615,000;

(b) the joint and several guarantee by all the directors of the borrower in their personal capacities; and

(c) the deposit of the *Al-Mudharabah* General Investment Account Certificate for an amount of RM150,000 to be placed under lien with the plaintiff bank throughout the duration of the revolving fixed facility.

[4] The revolving credit facility agreement dated 22 March 1997 makes allowance for the variation of the interest rate at cl 3.08 thereto. And by way of cl 9.01(b), the borrower has to punctually pay all its indebtedness under the agreement when due and owing. The events of default are amply set out in cl 10.01(a)–(l).

[5] The additional letter of offer dated 15 April 2000 styled as the NPGS alluded to the recent credit review conducted by the officers of the plaintiff bank which showed that the borrower's balance outstanding of RM689,315.89 under the existing NPGS revolving credit facility of RM750,000 had to be revised on the following terms:

(a) by 12 fixed equal monthly instalments of RM14,000 each commencing March 2000;

(b) thereafter, by another 12 fixed equal monthly instalments of RM19,000 each commencing March 2001;

(c) subsequently, by 11 fixed equal monthly instalments of RM23,000 each commencing March 2002; and

(d) a final instalment of RM151,139.85 which shall be set off against the *Al-Mudharabah* General Investment Account Certificates ('*Al-Mudharabah*') of RM150,000 including dividend placed under lien with the plaintiff bank and the borrower is required to pay the difference between the actual amount realised from the *Al-Mudharabah* account and the balance outstanding under the revolving credit facility, if any.

[6] Now, by way of a letter of guarantee dated 22 March 1997, the defendant guarantor together with Cheng Yoke Yoon agreed to stand as guarantors to the borrower. Clause 1 is the crucial clause in the letter of guarantee. It is worded in this way:

> To pay and satisfy to you on demand all every and any part of the said Loan and interest thereon …

[7] The recital to the letter of guarantee dated 22 March 1997 binds the defendant guarantor together with Cheng Yoke Yoon because they 'hereby agree with undertake and guarantee to you (referring to the plaintiff bank)'. Clause 13 states that it is a continuing guarantee and it is worded in this way:

> 13. This Guarantee is expressly intended to and shall be a continuing guarantee for all moneys whatsoever now or from time to time owing to you by the Borrower notwithstanding that the Borrower may at any time or times cease to be indebted to you for any period or periods and notwithstanding any settlement of account or accounts.

[8] And by cl 16 of the letter of guarantee dated 22 March 1997, the guarantee binds the guarantor's successors-in-title and assigns and personal representation (representatives). The guarantee too, by virtue of cl 18(iii), binds the defendant guarantor together with Cheng Yoke Yoon 'jointly and severally'.

[9] The borrower defaulted on the repayment terms and had breached not only the letter of offer but also the revolving credit facility agreement and the additional letter of offer. The plaintiff bank had obtained judgment in default of appearance against the borrower on 28 May 2001 for the sum of RM685,817.33 together with interest on RM685,817.33 at the rate of 10.45%pa calculated on monthly rests commencing from 23 February 2001 until full settlement and interest on RM98,479.68 at the rate of 1%pa calculated on monthly rests commencing from 23 February 2001 until full settlement and costs of RM225 under Civil Suit No 22–107 of 2001 ('the first suit').

[10] Acting in abundance of caution, the plaintiff bank withdrew the first

suit with liberty to file afresh by filing a notice of discontinuance dated 15 September 2008 that was duly executed by the solicitors acting for the defendant guarantor on the basis that the plaintiff bank agreed with the contention of the defendant guarantor that the first suit was prematurely filed as the defendant guarantor did not receive the notice of demand issued by the plaintiff bank dated 1 November 2000 ('the first notice of demand'). A B

[11] The plaintiff bank then issued a letter of demand dated 21 October 2008 (the 'second notice of demand') to the defendant guarantor which was received by the defendant guarantor demanding for a sum of RM603,838.75 as at 31 August 2008. The second notice of demand dated 21 October 2008 together with proof of posting can be seen at pp 122–124 of the appeal record at *Jilid* 2. C

[12] The plaintiff bank had exhibited a 'certificate of indebtedness' as seen at p 126 of the appeal record at *Jilid* 2 and certified that a sum of RM603,838.75 was due and owing as at 31 August 2008 from the defendant guarantor to the plaintiff bank. D

ANALYSIS

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[13] We are dealing with a contract of guarantee between the plaintiff bank and the defendant guarantor in this judgment. The other guarantor Cheng Yoke Yoon, although mentioned by name, is not involved in this appeal.

[14] In a contract of guarantee, the guarantor guarantees that he is personally liable for the debt, default or misdeed of the principal debtor. And the liability of the guarantor is always subject to the principal debtor who is primarily liable to the creditor (*Mallet v Bateman* (1865) LR I CP 163 (Ex Ch); *Harburg India Rubber Comb Co v Martin* [1902] 1 KB 778 at p 784 (CA); *Fahey v MSD Speirs Ltd* [1973] 2 NZLR 655 (CA); and *"")""""">Clipper Maritime Ltd v Shirlstar Container Transport Ltd, The Anemone* [1987] 1 Lloyd's Rep 546 at p 555). F G

[15] According to an old vintage case of *Sampson And Others, Assignees of Cook, a Bankrupt v Burton And Others* (1820) 129 ER 891; (1820) 4 Moore CP 515, a contract of guarantee is a contract to indemnify the creditor when the principal debtor is in default. Hence, there must be the principal debtor before there is a guarantor. Without the principal debtor there can be no guarantor. Lord Selborne put it nicely in *Thomas Lakeman v JP Mountstephen* (1874) LR 7 HL 17, at p 25 in this way: H I

> There can be no suretyship unless there be a principal debtor, who of course may be constituted in the course of the transaction by matters ex post facto, and need not be so at the time, but until there is a principal debtor there can be no suretyship. Nor can a man guarantee anybody else's debt unless there is a debt of some other person to be guaranteed.

[16] Here, the borrower is the principal debtor. And the guarantor is the defendant. While the creditor is the plaintiff bank.

[17] Now, an application for summary judgment housed in O 14 of the Rules of the High Court 1980 ('RHC') is a special procedural device to curtail and curb the need for a full trial. It is the best way to dispose off an action especially where the defendant's defence is clearly unsustainable in law or on the facts. It certainly saves time and costs and its popularity has grown by leaps and bounds. But where there are triable issues, summary judgment is not recommended (*Rock Records (M) Sdn Bhd v Audio One Entertainment Sdn Bhd* [2005] 3 MLJ 552 (HC)).

[18] In challenging the O 14 application, all that a defendant needs to do is to show to the court that there is a triable issue of fact or of law (*Malaysian Assurance Alliance Bhd v Yeam Sai Ming & Ors* [1996] 5 MLJ 345). It is not sufficient for the defendant to just raise an issue because the issue that is raised must be an arguable issue which requires a trial in order to determine it, once and for all (*Voo Min En & Ors v Leong Chung Fatt* [1982] 2 MLJ 241 (FC)).

[19] To determine whether an issue is or is not triable, the court must sieve through the affidavit evidence and identify the facts or the law stated therein with a fine toothcomb and decide whether it is triable or otherwise. And if the defendant asserts that he is not indebted to the plaintiff, it is incumbent on the defendant to explain why he is not so indebted (*In re General Rail Syndicate, Whiteley's case* [1900] 1 Ch 365).

[20] With these basic legal niceties, we will proceed to the heart of the matter. It was argued by the defendant guarantor that the suit filed by the plaintiff bank is time barred by reason of the fact that the breach by the borrower had occurred as early as July 2000 and that the six years time period had expired in 2006. And since the present suit commenced by the plaintiff bank was only filed in 2008, limitation has set in. But the cause of action of the plaintiff bank only begun when the second notice of demand was issued against the defendant guarantor and that would be on 21 October 2008. In short, the accrual of the cause of action is calculated from 21 October 2008 and not from the date of the breach by the borrower which was sometime in early July 2000.

[21] In the English Court of Appeal case of *Bradford Old Bank, Ltd v Sutcliffe* [1918] 2 KB 833, it was held that the plaintiffs' claim was not barred by the Statute of Limitations, as no cause of action arose against the surety until demand had been made by the plaintiffs, and no demand was made till 1912. Likewise here, the words 'on demand' appearing in cl 1 of the letter of demand meant that the second notice of demand issued by the plaintiff bank on

21 October 2008 against the defendant guarantor triggered the cause of action and that being the case limitation has not set in.

[22] Clause 1 of the letter of guarantee carries an express stipulation that the defendant guarantor and Cheng Yoke Choon are liable to make payment to the plaintiff bank 'on demand' just like, by way of an analogy, such cases like *Sicklemore v Thistleton* [1814–23] All ER Rep 355; (1817) 6 M & S 9; *In re Brown's Estate, Brown v Brown* [1893] 2 Ch 300; and *General Financial Corporation of Canada v LeJeune* [1918] 1 WWR 372 (Can).

[23] Clause 13 of the letter of guarantee envisages a continuing guarantee and is of unlimited duration which extends to a series of transactions. Put in another way, it is a continuing guarantee that guarantees a series of future transactions entered into between the borrower as the principal debtor and the plaintiff bank as the creditor.

[24] Still on the issue of limitation, reference should be made to the case of *Wee Kee Puan v Oversea-Chinese Banking Corporation Ltd* [1982] 1 MLJ 64 (FC), where Salleh Abas FJ (later Lord President) writing for the Federal Court had this to say at p 65 of the report:

> On the other hand the cause of action against a person who stood as a surety for an overdraft facility only accrues when a demand for repayment is made to the surety.

[25] Zakaria Yatim J (later FCJ) in *Bank Bumiputra Malaysia Bhd v Fu Lee Development Sdn Bhd & Ors* [1991] 2 MLJ 202 held that since the guarantee provided that the second defendant would pay the plaintiff 'on demand', time only started to run when the plaintiff made a demand on 29 July 1987 on the second defendant. And since the present suit was filed on 16 September 1987, His Lordship held that the plaintiff's claim against the second defendant was not time barred.

[26] Alauddin Mohd Sheriff JCA (later PCA) in *Soon Peng Yam & Anor v Bank of Tokyo-Mitsubishi (Malaysia) Bhd* [2004] 2 MLJ 31; [2004] 1 CLJ 532, writing for this court said at p 35 (MLJ); 535 (CLJ):

> On the first issue, it is settled law that the liability of a guarantor arises only on demand made. The service of a notice of demand is a prerequisite for the institution of any proceedings in respect of the claim.

[27] Gopal Sri Ram JCA (later FCJ) writing a separate judgment for this court in *The Pacific Bank Bhd v Chan Peng Leong* [1998] 2 MLJ 613; [1998] 2

CLJ 440, emphasised the need of a proper demand before instituting proceedings to enforce the guarantee. At pp 613–614 (MLJ); p 448 (CLJ), this was what His Lordship said:

> In the present instance, the point in issue in the first action that was determined necessarily and with precision was that the demand upon which that action was based was invalid. There was, in other words, no demand. The first action had therefore been commenced prematurely. The bank was accordingly at liberty to issue a proper demand and to institute proceedings to enforce the guarantee based upon that demand. In my judgment neither res judicata, nor issue estoppel, nor cause of action estoppel operated to bar the second action.

[28] In the context of the present appeal, a proper demand was made on 21 October 2008 when the second notice of demand was issued and it is on that date that the cause of action accrues. Thus, the date on which the cause of action accrues sets the date from which time will run against the plaintiff bank.

[29] Next, it was argued that the obligation of the defendant guarantor was discharged by virtue of the additional letter of offer dated 15 April 2000. This is a non issue. As a director of the borrower, the defendant guarantor is bound by the terms of the additional letter of offer since it was received by the borrower and payments were made by the borrower in accordance with the terms of the additional letter of offer which essentially varied the terms and the amount of repayment. Put it differently, the additional letter of offer will not discharge the defendant guarantor's liability.

[30] Clause 4(iii) of the letter of guarantee pins the liability of the defendant guarantor. That clause 4(iii) states as follows:

> 4. This Guarantee shall be without prejudice to and shall not be affected nor shall I/We be released or exonerated by any of the matters following:-
>
> (iii) Any time given or extended to the Borrower and/or any other person or persons including myself/any of ourselves and the parties to any negotiable or other security instrument guarantee or contract or any other indulgence granted to or compromise composition or arrangement made with the Borrower and/or any other person or persons whether with or without consent or notice to me/us.

[31] It is thus not open to the defendant guarantor to argue that he is discharged from liability to indemnify the plaintiff bank as the creditor by virtue of the additional letter of offer.

[32] In regard to the issue of whether the certificate of indebtedness can be used to prove indebtedness, reference should be made to cl 5 of the letter of

guarantee which allows usage of the said certificate as conclusive evidence to prove the debt that is due. That cl 5 of the letter of guarantee is worded as follows:

> 5. Any accounts settled or stated by or between you and the Borrower or admitted by or on behalf of the Borrower may be adduced by you and shall in that case be accepted by me/us and my/our representatives as conclusive evidence that the balance or amount thereby appearing is due from the Borrower to you.

[33] It is germane, at this juncture, to refer to the case of *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (FC) where Raja Azlan Shah CJ (Malaya) (as His Majesty then was) aptly said at p 284 of the report:

> In the circumstances the respondents are bound under clause 19 to accept the certificate of indebtedness duly executed by the Assistant Vice-President of the Branch as conclusive evidence of the debt due to the bank. On this footing the bank would be entitled to judgment as prayed for.

[34] The conclusiveness of the certificate of indebtedness is finally settled by the Federal Court in the case of *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544.

[35] Be that as it may, the defendant guarantor ought not to be allowed to challenge the correctness of the certificate of indebtedness because the defendant guarantor has not alluded to this in any of his affidavits in reply nor was there any averment that there were manifest errors in the said certificate. A submission from the bar on this very crucial issue will not be entertained by this court (*Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 CLJ 609 (CA); and *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287; [1995] 2 AMR 1174; [1995] 4 CLJ 339 (HC)).

[36] It is crystal clear that there are no triable issues at all nor any defence to the claim advanced by the plaintiff bank. For these varied reasons, we unanimously allowed the appeal of the plaintiff bank with costs of RM10,000 and we accordingly entered summary judgment against the defendant guarantor. We set aside the decision of the learned JC. Deposit refunded to the plaintiff bank.

Appeal allowed with costs of RM10,000 and summary judgment entered against defendant.

Reported by Kanesh Sundrum